

October 23, 2006

Civil Division-Kent County (739-7641)

Mr. Lee Williams  
Investigative Reporter  
The News Journal  
P.O. Box 15505  
Wilmington, DE 19850

Re: **Freedom of Information Act Complaint  
Against Wilmington Housing Authority**

Dear Mr. Williams:

Our Office received your complaint on September 19, 2006 alleging that the Wilmington Housing Authority ("the Authority") violated the public record requirements of the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA").

By letter dated September 6, 2006, you asked the Authority for "all reports, studies and documents pertaining to the Crestview Apartment fire, its aftermath, subsequent investigations and structural integrity of the building."

By letter dated September 15, 2006, the Authority denied "your request because the requested documents constitute 'records pertaining to pending or potential litigation which are not records of any court,' which are specifically excluded from the definition of 'public records' under [FOIA]. 29

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Del. C. §10001(d)(7)." <sup>1</sup>

By letter dated September 22, 2006, we asked the Authority to respond to your complaint by October 2, 2006. We received the Authority's response (dated October 2, 2006) on October 4, 2006.

In its response, the Authority reiterated its position that the records you requested are exempt from disclosure under FOIA as records pertaining to pending or potential litigation. In support, the Authority attached "letters received from counsel on behalf of Crestview residents who asserted demands based on the Crestview fire. Exhibit A. In addition, at least a dozen residents have made claims for missing or damaged property as a result of the fire, which have not all been resolved. Exhibit B. Although it appears that the claims alleged by counsel have been resolved as of this date, the Authority cannot be assured that the threat is removed until the statute of limitations period on these claims expires. The potential for litigation against the Authority as a result of the claims made by residents, both represented and unrepresented, remains tangible."

### **RELEVANT STATUTES**

FOIA provides that "[a]ll public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body." 29 *Del. C.* §10003(a).

FOIA exempts from disclosure "[a]ny records pertaining to pending or potential litigation which are not records of any court." 29 *Del. C.* §10002(g)(9).

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<sup>1</sup> The Authority miscited the claimed exemption, which should be Section 10002(g)(9).

### **LEGAL ANALYSIS**

FOIA's pending/potential litigation exemption is designed to maintain a level playing field: a party or potential party to litigation cannot use FOIA to obtain information in lieu of the rules of civil discovery. "Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court's rules of procedure." *Mell v. New Castle County*, 835 A.2d 141, 147 (Del. Super. 2003) (Slights, J.) (citing *Koyste v. Delaware State Police*, C.A. No. 00C-08-088, 2001 WL 1198950, at p.3 (Del. Super., Sept. 18, 2001) (Babiarz, J.)).

In *Office of the Public Defender v. Delaware State Police*, C.A. No. 01C-09-208, 2003 WL 1769758 (Del. Super., Mar. 31, 2003) (Silverman, J.), the Superior Court held that the Public Defender could not use FOIA to obtain information from the State Police to use in criminal trials. "Their legitimate interest concerns pending or potential litigation, which is exempt from the Act. Again, the point is that this case does not touch on the public's 'right to know.' It is exclusively about litigators and litigants looking for materials that might help them in court. And the legislature has made it clear that the Act is not intended to supplant, nor even to augment, the court's rules of discovery." 2003 WL 1769758, at p.3.

In *Att'y Gen. Op.* 04-IB20 (Nov. 16, 2004), a reporter made a FOIA request to the county for a copy of a police accident report. The county contended the report was exempt from disclosure under FOIA because it pertained to a pending lawsuit brought by an employee against the county. The employee's complaint alleged that the county retaliated against him after he claimed the county tried to cover up a hit-and-run accident involving the county administrator's son.

Our Office determined that FOIA's pending/potential litigation exemption did not apply.

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Neither the reporter nor her newspaper "is a party or potential party to the civil rights litigation between Lieutenant Henry V. Tobin, III and the County. The County, therefore, cannot invoke the pending litigation exemption under FOIA to deny you public records that may have some nexus to the civil rights litigation because you are not a litigant, and there is no evidence that you are trying to use FOIA to circumvent the civil discovery rules." <sup>2</sup>

We believe that *Att'y Gen. Op.* 04-IB20 is directly on point. There is no evidence in the record to suggest that you or The News Journal is trying to use FOIA to obtain information as a prelude to a lawsuit against the Authority. The purpose of the newspaper's FOIA request is apparently "the request of a typical citizen trying to know what the government is up to" and not "a law firm's request, made on behalf of litigants the law firm represents." *Office of the Public Defender*, 2003 WL 1769758, at p.2.

We determine that the Authority violated FOIA when it denied you access to public records which are not exempt as records pertaining to pending or potential litigation as contemplated by the statute.

### **CONCLUSION**

For the foregoing reasons, we determine that the Authority violated the public record requirements of FOIA by not providing you with access to information you requested regarding a fire at the Crestview Apartment. Those records are not exempt under FOIA's pending or potential

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<sup>2</sup> In *Att'y Gen. Op.* 04-IB20, our Office determined that the police accident report was exempt under FOIA as an investigative file. See 29 Del. C. §10002(g)(3).

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litigation exemption because neither your nor The News Journal is a party or potential party to any litigation with the Authority.

As remediation, we direct the Authority to provide you with access to those records within ten days of the date of this letter. The Authority has discretion to allow you to inspect and copy those records on your own during regular business hours, or to copy and send them to you at a reasonable cost. We direct the Authority's counsel to report back to our Office within ten days after remediation is completed.

Very truly yours,

W. Michael Tupman  
Deputy Attorney General

APPROVED:

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Lawrence W. Lewis, Esquire  
State Solicitor

cc: The Honorable Carl C. Danberg  
Attorney General

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